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BANGGI QUARRY SDN BHD v. MENTERI TENAGA DAN SUMBER ASLI & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
AMARJEET SINGH SERJIT SINGH J
[JUDICIAL REVIEW NO: WA-25-199-05-2021]
B 17 MARCH 2025

Abstract – *In judicial review proceedings, monetary compensation is different from damages. An application for monetary compensation under O. 53 r. 2(3) of the Rules of Court 2012 in guise of damages ought not to be entertained by the court. Such claim is an abuse of the process of the court.*

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CIVIL PROCEDURE: *Judicial review – Application for – Substantive action for certiorari to quash decision by Minister and further and consequential relief for damages – Whether monetary compensation in judicial review different from damages – Whether claim arose as monetary compensation as envisaged under O. 53 r. 2(3) of Rules of Court 2012 – Whether claim for monetary compensation in guise of damages or refund of deposit amounted to abuse of process of court – Whether applicant established breach of fundamental right over and above realm of private law – Whether applicant entitled to monetary damages*

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The applicant, a company dealing with sea sand mining, was awarded a sand mining licence ('licence 0099') to mine sand at the designated continental shelf area for five years, and the consideration was the stipulated monthly payment of royalty to the Government. When the applicant failed to pay any royalty as per the condition in licence 0099, the applicant was asked to show cause why no royalty was forthcoming. In response, the applicant stated that there was no demand in the domestic market and that the applicant was in the midst of applying for an export permit to sell sand to Singapore. The Minister did not accept the reason as it was the condition of licence 0099 that the mined sand was for domestic use and not for export. The Minister then, without according the applicant the right to be heard, imposed an additional condition requiring the applicant to begin operations to mine sand within six months from the date of the additional condition. The applicant failed to commence operations, and no royalty was ever paid. As a result, the Minister terminated the licence, some 15 months before the expiry of the licence. Aggrieved, the applicant commenced the instant judicial review application. The court allowed the substantive judicial review application for an order of *certiorari* to quash the decision terminating licence 0099. The court, however, refused a further and consequential relief, to wit, an order for damages to be assessed on the ground that no such relief for damages was

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pleaded or sought as required by O. 53 r. 5(1) of the Rules of Court 2012 ('ROC'). The applicant did not appeal against the decision and instead, proceeded to seek monetary compensatory under the liberty to apply principle, by filing a notice of application under O. 53 r. 2(3) of the ROC.

Held (dismissing applicant's application):

(1) In judicial review proceedings under O. 53 of the ROC, monetary compensation is different from damages. What was particularised as monetary compensation by the applicant were: (i) refund of the deposit; (ii) losses of sea sand based on export market rate; or in the alternative, losses of sea sand based on domestic market rate; or in the alternative, loss of revenue. It was an abuse of the process of the court to claim monetary compensation in the guise of a claim for damages or refund of deposit. The applicant's claims would arise in the assessment of damages and not as monetary compensation envisaged in O. 53 r. 2(3) of the ROC. In the circumstances, the court was *functus officio* to deal with the claim for damages disguised as monetary compensation. (paras 16-19)

(2) The High Court has power to award constitutional monetary compensation for a breach of a fundamental right over and above the realm of private law. However, this was not a proper case for constitutional monetary damages for the following reasons: (i) the applicant did not have a fundamental right breached. A fundamental right is an inalienable right. It is inherent, such as the right to life and liberty. In the instant case, the licence was not an inalienable right. The licence was obtained on application to the appropriate authority and was subject to conditions. The Minister terminated the licence wrongfully. The only appropriate remedy was damages; and (ii) where the appropriate remedy is damages, the claim ought to be made under O. 53 r. 5(1) of the ROC. (paras 26 & 27)

Case(s) referred to:

Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor [2021] 2 CLJ 579 FC ***(foll)***
R Rama Chandran v. Industrial Court Of Malaysia & Anor [1997] 1 CLJ 147 FC ***(foll)***

Legislation referred to:

Courts of Judicature Act 1964, Schedule para. 1
Rules of Court 2012, O. 53 rr. 2(3), 5(1), Schedule para. 1

For the applicant - Rajendra Navaratnam, Mak Hon Pan & Koh Yi Ting, M/s Azman Davidson & Co
For the respondents - Nur Irmawatie Daud; SFC

Reported by S Barathi

JUDGMENT

Amarjeet Singh Serjit Singh J:

Introduction

[1] On 10 November 2022, the applicant, Banggi Quarry Sdn Bhd, applied by way of notice of application (encl. 37) under O. 53 r. 2(3) of the Rules of Court 2012, asking this court to award it with monetary compensation.

[2] The application was made after this court had, on 11 October 2022, allowed the substantive judicial review application for an order of *certiorari* to quash the decision terminating a sand mining licence (licence 0099), which had another 15 months to go before the said licence expires. The licence was for five years or 60 months. I allowed the application on the basis that although the Minister of Natural Resources and Environment ("the Minister") had a right to change the conditions, the Minister did not accord the applicant a right to be heard before making the change as a condition of licence 0099.

[3] Of crucial importance is the fact that I had on that date also refused further and consequential relief, to wit, an order for damages to be assessed. The reason for refusing consequential relief was that no such relief for damages was pleaded or sought in the O. 53 statement as required by O. 53 r. 5(1) of the Rules of Court 2012. The applicant is bound by its pleadings and was therefore not entitled to an order of assessment of damages.

[4] This court was *functus officio* after making the substantive order and refusing further and consequential relief for damages to be assessed. The applicant's remedy, if any, was to appeal against the refusal for an order that damages be assessed. But the applicant did not file any appeal. Thus, there was a finality of the dispute between the parties on 11 October 2022.

[5] Nevertheless, the applicant proceeded to file this application under O. 53 r. 2(3) of the Rules of Court 2012 in the same judicial review proceedings on the basis that monetary compensatory is different from damages, which was not allowed. The monetary compensation sought the following:

(i) a refund of RM100,000 paid by the applicant as deposit for licence 0099;

(ii) losses for underwater sea sand taken from the concession area of licence 0099 as follows:

(a) the sum of RM32,496,354.87 being the value of the underwater sea sand calculated, taken from the concession area based on the export market rate of RM8.31 per metre cube less royalty payable to the Government; or

(b) in the alternative to (i) above, the sum of RM28,061,156.83 being the value of the underwater sea sand taken from the concession, calculated based on the domestic market value at RM4.29 per metre cube less royalty payable to the Government.

(iii) in the alternative to (b)(i) and (ii) above, the sum of RM35,000,000 being the loss of revenue arising out of the termination of licence 0099.

[6] On 11 September 2024, I dismissed the notice of application. This judgment contains the reasons for my decision.

Facts

[7] The applicant is a company dealing with sea sand mining. It applied for and was awarded licence 0099 to mine sand at the designated continental shelf area of 431.6km square feet ("the concession"). The condition of the licence gave the applicant the right to mine sand in the designated area for five years, commencing 11 July 2017 to 10 July 2022, and the consideration was the stipulated monthly payment of royalty to the Government.

[8] However, the applicant failed to pay any royalty as per the condition in licence 0099. After six months of the licence 0099 coming into effect, the applicant was asked to show cause *vide* letter dated 5 February 2018 why no royalty was forthcoming. The applicant responded, stating that there was no demand in the domestic market and that the applicant was in the midst of applying for an export permit to sell sand to Singapore.

[9] The applicant did not accept the reason as it was the condition of licence 0099, *ie*, condition 15, that the mined sand was for domestic use and not for export. This was when the Minister, without according the applicant the right to be heard, imposed an additional condition requiring the applicant to begin operations to mine sand within six months from the date of the additional condition. The additional condition was notified to the applicant *via* a letter dated 6 November 2019.

[10] The applicant failed to commence operations, and no royalty was ever paid. As a result, the Minister, on 25 March 2021, terminated the licence for failure to commence operations for sand mining as per the additional condition. At this point in time, there was some 15 months to go before the expiry of licence 0099. Aggrieved with the decision, the applicant, on 31 May 2021, commenced the instant judicial review application. Leave was granted on 12 July 2021 in the main for the following reliefs:

(i) an order for *certiorari* to quash the decision terminating licence 0099; and

(ii) an order of *mandamus* that licence 0099 be reinstated by the Minister.

[11] On 11 October 2022, I only allowed the order for *certiorari* to quash the decision terminating the licence 0099 and refused the further and consequential relief for an order to assess damages. It was clear that the applicant had accepted the refusal and did not appeal against the decision.

[12] The applicant instead proceeded to seek monetary compensatory under the liberty to apply principle by filing this notice of application to give effect to the order quashing the decision to terminate licence 0099.

Decision Of The Court

[13] The grounds for making the claim for monetary compensation was stated in the notice of application as follows:

(i) the applicant was denied its fundamental right to its property, *ie*, licence 0099 and underwater sea sand, a right guaranteed under law and/or the Federal Constitution from 25 March 2021 to 10 July 2022 without adequate compensation and therefore shall be compensated accordingly; and

(ii) given that licence 0099 has expired, the order of this court has become nugatory and therefore necessary to grant the applicant further and consequential relief in the form of monetary compensation to give effect to this court's decision.

Damages Disguised As Monetary Damages

[14] In the instant case, where the licence is wrongfully terminated, damages would be the appropriate remedy. The applicant also knew that upon the termination of licence 0099, the Minister was going to grant an identified third party the rights to mine sea sand in the same area. For this purpose, the applicant sought a stay of the granting of the licence to the third party, which was refused on 14 September 2021. The order of *mandamus* sought was also of no utility. However, the applicant did not plead for damages, and I had refused the prayer for further and consequential relief for damages to be assessed on the ground that nothing was pleaded of damages as required under O. 53 r. 5(1) of the Rules of Court 2012.

[15] This court was, therefore, *functus officio* on the issue of damages.

[16] However, the applicant, using the liberty to apply principle, applied for monetary compensation under O. 53 r. 2(3) of the Rules of Court 2012. It is trite that in judicial review proceedings provided by O. 53 of the Rules of Court 2012, monetary compensation is different from damages (see *R Rama Chandran v. Industrial Court Of Malaysia & Anor* [1997] 1 CLJ 147; [1997] 1 MLJ 145, per Edgar Jopesh Jr, FCJ at pp. 196 to 197; endorsed by Tengku Maimun Tuan Mat CJ, dissenting, at para. [608] in *Maria Chin Abdullah v. Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579).

[17] I found upon a careful scrutiny of what was particularised as monetary compensation by the applicant was actually in nature and substance a claim for (i) refund for the deposit; and (ii) for a claim for damages. This is clear from the description of the amounts that are claimed, namely:

(i) the refund of the deposit of RM100,000;

(ii) losses of sea sand based on export market rate amounting to RM32,496,354.87 less royalty payments; or

in the alternative, losses of sea sand based on domestic market rate amounting to RM28,061,156.83 less royalty payments; or

in the alternative, loss of revenue amounting to RM35,000,000.

[18] I hold that it is an abuse of the process of the court to claim monetary compensation in the guise of a claim for damages or refund of deposit. What is claimed further requires an assessment of the following factors:

(i) the applicant is claiming losses for the entire duration of the licence when he has only some 15 months left to mine before the licence expires on 10 July 2022;

(ii) the applicant did not even commence mining until the licence was terminated and had breached the payment of royalty condition, which required payment of royalty every month;

(iii) the applicant's reason for not commencing operations was because there was no demand for the domestic market and was in the midst of applying for an export permit to export sand to Singapore – when the condition of licence 0099 was to mine sea sand for the domestic market and not for export;

(iv) the non-payment of royalty of 45 months was a serious breach of licence 0099 and would result in the forfeiting of the deposit under Condition 27, which read as follows:

> Kegagalan mematuhi mana-mana syarat yang dinyatakan ini akan mengakibatkan lesen yang telah dikeluarkan itu boleh dibatalkan, tindakan di bawah undang-undang yang berkaitan boleh diambil oleh mana-mana agensi yang berkenaan terhadap Pelesen, dan kesemua wang cagaran yang dinyatakan di perenggan 2 dan 3 boleh dirampas.

[19] All the above matters would arise in the assessment of damages and not as monetary compensation envisaged in O. 53 r. 2(3) of the Rules of Court 2012. In the circumstances, I held that this Court is *functus officio* to deal with the claim for damages disguised as monetary compensation.

Monetary Compensation Under O. 53 r. 2(3)

[20] Independently from the above reason, the applicant submitted that it is entitled to monetary compensation under O. 53 r. 2(3) of the Rules of Court 2012. The issue of monetary compensation is not subject to the *functus officio* principle as that applies to the order of damages that was not allowed and not monetary compensation.

[21] I must make it clear to avoid any doubts that monetary compensation, as now pleaded in the instant notice of application, was never raised before me at the conclusion of the substantive stage of the judicial review proceedings. I had then clearly held that the applicant had failed to plead damages in the O. 53 statement as required by O. 53 r. 5(1) of the Rules of Court 2012. That was the reason the claim for damages as further and consequential relief was refused.

[22] Order 53 r. 2(3) of the Rules of Court 2012 provide as follows:

> Upon the hearing of an application for judicial review, the Court shall not be confined to the relief claimed by the applicant but may dismiss the application or make any orders, including an order of injunction or monetary compensation.

[23] Thus, although not claimed, the court has the power to award monetary compensation at the conclusion of the hearing. At the conclusion of the hearing, I did not make or refuse any order for monetary compensation. The applicant now seeks to bring *vide* the "liberty to apply" principle seeking relief for further and consequential order of monetary compensation. Assuming the applicant is entitled to do so, the issue before me is then whether the applicant is entitled to monetary compensation under O. 5 r. 2(3) of the Rules of Court 2012.

[24] The contention of the applicant was that it was entitled to monetary compensation as its "fundamental right to property, *ie*, licence 0099 and underwater sea sand, under law and/or the Federal Constitution from 25 March 2021 to 10 July 2022" was denied "without any and/or adequate compensation". The principle of law propounded in *R Rama Chandran* was relied on. The principle states that the reach and extent of the Court in judicial review proceedings, arising from a violation of a fundamental right, having regard to the breadth of para. 1 of the Schedule of the Courts of Judicature Act 1964, extends to the making of an award of monetary compensation.

[25] This principle was endorsed and explained by Tengku Maimun Tuan Mat CJ (dissenting), at para. [608] in *Maria Chin Abdullah* in the following words:

> 108. ... I endorse the views of Edgar Joseph Jr FCJ in *Rama Chandran* (*supra*) and accept ... that the courts have the power to award constitutional monetary compensation over and above the realm of private law and the specific plea of damages in O. 53 r. 5 of the ROC 2012. I say this with a caveat that where the case is expressly for damages, it would be more apposite to bring it under O. 53 r. 5 and that constitutional monetary compensation is reserved only for the most deserving of cases where it stands as the only appropriate remedy. In this, I echo Edgar Joseph Jr FCJ's sentiment as follows, ... of *Rama Chandran*:

> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test of the content will be governed by all the circumstances of the particular case will have to be applied.

[26] Thus, the law gleaned from *R Rama Chandran* and *Maria Chin Abdullah* is that the High Court has power to award constitutional monetary compensation for a breach of a fundamental right over and above the realm of private law and the specific plea of damages under O. 53 r. 5 of the Rules of Court 2012 is as follows:

(i) where the case is one where the appropriate remedy is damages, the claim ought to be made under O. 53 r. 5(1) of the Rules of Court 2012;

(ii) the remedy of constitutional monetary compensation is reserved only for the most deserving of cases where it stands as the only appropriate remedy; and

(iii) the grant constitutional monetary compensation is an appropriate case – strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case, will have to be applied.

[27] Applying the law to the facts of the instant case, I hold that this is not a proper case for constitutional monetary damages for the following reasons:

(i) the applicant did not have a fundamental right breached. A fundamental right is an inalienable right. It is inherent, such as the right to life and liberty. In the instant case, the licence is not an inalienable right. The licence is obtained on application to the appropriate authority and is subject to conditions. The Minister terminated the licence wrongfully, as alluded to above. The only appropriate remedy is damages; and

(ii) where the appropriate remedy is damages, as in the instant case, the claim ought to be made under O. 53 r. 5(1) of the Rules of Court 2012 (see *Maria Chin Abdullah* (above)).

[28] For the above reasons, the application for constitutional monetary compensation is dismissed.